



ATTORNEY GENERAL OF TEXAS
G R E G A B B O T T

May 23, 2005

Mr. Jim Thompson
General Counsel
State Board of Educator Certification
1701 North Congress Avenue, 5th Floor
Austin, Texas 78701

OR2005-04462

Dear Mr. Thompson:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 224677.

The State Board for Educator Certification (the "board") received a request for the board's file related to the requestor. You claim that the requested information is excepted from disclosure under sections 552.026, 552.101, 552.107, 552.111, and 552.114 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

We begin by addressing your arguments under section 552.107 of the Government Code, which protects information coming within the attorney-client privilege. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. Open Records Decision No. 676 at 6-7 (2002).

First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made "for the purpose of facilitating the rendition of professional legal services" to the client governmental body. TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *In re Tex. Farmers Ins.*

Exch., 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a confidential communication, meaning it was “not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.” *Id.* 503(a)(5).

Whether a communication meets this definition depends on the intent of the parties involved at the time the information was communicated. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no writ). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

You state that the information you have labeled Attachment A constitutes communications between board attorneys and a board employee. You also indicate that these communications were made for the purpose of facilitating the rendition of professional legal services, and that these communications were intended to be, and have remained, confidential. Having considered your representations and reviewed the communications at issue, we conclude that the attorney-client privilege is applicable to Attachment A. Thus, the board may withhold Attachment A under section 552.107(1).¹

You assert that the documents you have labeled Attachment B are excepted from disclosure under section 552.101 of the Government Code. Section 552.101 excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” This section encompasses information protected by other statutes. The Family Educational Rights and Privacy Act of 1974 (“FERPA”) provides that no federal funds will be made available under any applicable program to an educational agency or institution that releases personally identifiable information, other than directory information, contained in a student’s education records to anyone but certain enumerated federal, state, and local officials and institutions, unless otherwise authorized by the student’s parent.

¹ As our ruling on this information is dispositive, we need not consider your other claimed exception to disclosure.

See 20 U.S.C. § 1232g(b)(1). “Education records” means those records that contain information directly related to a student and are maintained by an educational agency or institution or by a person acting for such agency or institution. *Id.* § 1232g(a)(4)(A). This office generally applies the same analysis under section 552.114 and FERPA. Open Records Decision No. 539 (1990).

Section 552.114 excepts from disclosure student records at an educational institution funded completely or in part by state revenue. Section 552.026 provides as follows:

This chapter does not require the release of information contained in education records of an educational agency or institution, except in conformity with the Family Educational Rights and Privacy Act of 1974, Sec. 513, Pub. L. No. 93-380, 20 U.S.C. Sec. 1232g.

Gov’t Code § 552.026. We note that the board is not an educational agency or institution for purposes of FERPA. Thus, FERPA and section 552.114 are generally inapplicable to the board. However, FERPA permits certain entities to have access to education records held by an educational agency or institution. 20 U.S.C. § 1232g(b). FERPA information “shall only be transferred to a third party on the condition that such party will not permit any other party to have access to such information without the written consent to the parents of the student.” *Id.* § 1232g(b)(4)(B). It is unclear to this office whether the board obtained Attachment B pursuant to these access provisions. Accordingly, pursuant to section 552.303(c) of the Government Code, this office notified you via facsimile on May 12, 2005, that additional information was needed in order to determine whether the board obtained the records at issue from the Weatherford Independent School District pursuant to FERPA’s access provisions. We requested that the additional information be provided to our office within seven calendar days of the date the notice was received. *See* Gov’t Code § 552.303(d). The notice further stated that failure to submit the requisite information would result in the legal presumption that the information at issue is public. *See* Gov’t Code § 552.303(e).

As of the date of this letter, we have not received your response. Therefore, we have no basis to determine that the board is prohibited from re-releasing the information at issue pursuant to section 1232(b)(4)(B). Because the board has not shown the applicability of FERPA, the board may not withhold the information at issue under FERPA.

However, we note that portions of the information at issue are subject to section 552.101 of the Government Code in conjunction with common law privacy.² Common law privacy protects information if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the

² Section 552.101 also encompasses the doctrine of common law privacy.

information is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. 540 S.W.2d at 683.

This office has found that the following types of information are excepted from required public disclosure under common law privacy: some kinds of medical information or information indicating disabilities or specific illnesses, *see* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps); personal financial information not relating to the financial transaction between an individual and a governmental body, *see* Open Records Decision Nos. 600 (1992), 545 (1990); information concerning the intimate relations between individuals and their family members, *see* Open Records Decision No. 470 (1987); and identities of victims of sexual abuse, *see* Open Records Decision Nos. 440 (1986), 393 (1983), 339 (1982). We have marked the information the board must withhold under section 552.101 in conjunction with common law privacy.

In summary, the board may withhold Attachment A under section 552.107(1). The board must withhold the information we have marked under section 552.101 in conjunction with the common law right to privacy. The remaining submitted information must be released.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the


Government Code. If the governmental body fails to do one of these things, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Tex. Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Cary Grace
Assistant Attorney General
Open Records Division

ECG/jev

Ref: ID# 224677

Enc. Submitted documents

c: Mr. Timothy Lambert
1427 CR 4371
Decatur, Texas 76234
(w/o enclosures)